

\*NO COPY OF THIS TRANSCRIPT MAY BE MADE PRIOR TO 11/1/12

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA	*	
	*	11-cr-06-01-JL
v.	*	March 27, 2012
	*	11:20 a.m.
BRIAN MAHONEY	*	
	*	
* * * * *	*	

TRANSCRIPT OF COMPETENCY HEARING  
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

Appearances:

For the Government:	Arnold Huftalen, AUSA U.S. Attorney's Office 53 Pleasant Street Concord, NH 03301
For the Defendant:	Paul Garrity, Esq. 14 Londonderry Road Londonderry, NH 03053
Court Reporter:	Sandra L. Bailey, LCR, CM, CRR Official Court Reporter United States District Court 55 Pleasant Street Concord, NH 03301 (603)225-1454

1                               BEFORE THE COURT

2                               THE CLERK:   The court has before it for  
3       consideration this morning a competency hearing in  
4       Criminal Case 11-cr-06-01-JL, United States of America  
5       versus Brian Mahoney.

6                               THE COURT:   Good morning, Mr. Mahoney.

7                               THE DEFENDANT:   Good morning, your Honor.

8                               THE COURT:   I apologize for keeping you  
9       waiting, everybody.   I was just doing some more legal  
10      research on the issues before the court today.

11                              Mr. Mahoney, I understand you very much wish  
12      for Mr. Garrity to not be your lawyer anymore, is that  
13      right?

14                              THE DEFENDANT:   There were certain situations  
15      that I wrote to you, that's correct, your Honor, because  
16      in situations that were unethical conduct of an attorney  
17      and things that I had objected to, and there was a whole  
18      lot of inconsistencies that Attorney Garrity did allow  
19      another attorney to present a motion that wound up  
20      showing up on my civil matter with David Hilts in the  
21      Rockingham Superior Court which that has now been  
22      rectified with a motion for leave to file for damages,  
23      because my name was placed on a web page after 25 years  
24      after being acquitted, both confirmed by prosecutor  
25      Huftalen and both confirmed by Mr. Garrity that yes, you

1     were placed on that web page wrongfully, and my motion  
2     that Attorney Levin filed, it was filed on the 11th of  
3     February, allowing to get the motion on the 18th. I  
4     objected to that. Attorney Garrity put that motion in,  
5     that wound up in my civil case last week, and with David  
6     Hilts, and I really wasn't too pleased. I did have a  
7     right by law to go to the New Hampshire Supreme Court.

8             THE COURT: I think the reporter is probably  
9     having a tough time keeping up.

10            THE DEFENDANT: Right, well --

11            THE COURT: Well, I want to get it all down on  
12     paper. When you're speaking so fast --

13            THE DEFENDANT: Yes.

14            THE COURT: I just ask you to slow it down for  
15     the reporter's sake.

16            THE DEFENDANT: Right. I did have the  
17     opportunity --

18            THE COURT: Let me ask you the question.

19            THE DEFENDANT: Yes, sir.

20            THE COURT: You have reported Mr. Garrity to  
21     the New Hampshire Supreme Court Professional Conduct  
22     Committee, right?

23            THE DEFENDANT: I have, your Honor, I have --

24            THE COURT: Hold on.

25            THE DEFENDANT: Yes, I have.

1 THE COURT: That's a yes, right?

2 THE DEFENDANT: That's correct.

3 THE COURT: And you do not wish for him to  
4 represent you anymore?

5 THE DEFENDANT: That's correct, your Honor.

6 THE COURT: Okay. I just want to make sure I  
7 understood that.

8 THE DEFENDANT: Yes.

9 THE COURT: I think, look, I think at this  
10 point, without commenting on the validity of these  
11 allegations -- you guys can sit by the way --

12 THE DEFENDANT: I wouldn't want to divulge  
13 that anyway, that's privileged.

14 THE COURT: Sure. I think it's time at this  
15 point for me to grant that, for me to -- for me to  
16 withdraw the appointment of Attorney Garrity as your  
17 lawyer and then make a determination about what to do  
18 next, you know, I know you've expressed an interest to  
19 represent yourself pro se.

20 THE DEFENDANT: I do.

21 THE COURT: Okay. So you don't want another  
22 lawyer?

23 THE DEFENDANT: I don't think that we came to  
24 that conclusion at all. I always thought that you said  
25 that regardless if you go pro se or not, it would be

1       beneficial to have a standby counsel.

2               THE COURT: I would, I would certainly --

3               THE DEFENDANT: I have somebody in mind since  
4       this is the third time now, this time I have a chance to  
5       pick for this court who I would like and I have a couple  
6       lawyers in mind that are appellate attorneys.

7               THE COURT: Slow down. I'm with you.

8               THE DEFENDANT: Okay.

9               THE COURT: Remind me, who was your first  
10      lawyer by the way?

11              THE DEFENDANT: It was Jeff Levin.

12              THE COURT: Jeff Levin, all right, and then  
13      Mr. Garrity, okay.

14              THE DEFENDANT: And then Mr. Garrity.

15              THE COURT: I can't promise you're going to  
16      get to pick, but I am going to listen to your  
17      suggestions, but we have to take it one step at a time,  
18      all right?

19              THE DEFENDANT: I understand that, chain of  
20      custody, command, yeah.

21              THE COURT: Okay. All right. But you're  
22      telling me that you'd like to, your preference at least  
23      at this point, once I withdraw the appointment of  
24      Attorney Garrity is to proceed pro se but with standby  
25      counsel.

1 THE DEFENDANT: That's correct, your Honor.

2 THE COURT: All right. Who do you suggest?

3 THE DEFENDANT: Well, I suggested Dorothy  
4 Graham because of the fact that Dorothy Graham just had  
5 a case recently September 11th of 2011, and it had to do  
6 with exactly what this case is about, 632-A:2,  
7 aggravated felonious sexual assault.

8 THE COURT: Is Dorothy Graham a New Hampshire  
9 lawyer?

10 THE DEFENDANT: She is.

11 MR. GARRITY: She works for the New Hampshire  
12 Appellate Defenders Office.

13 THE COURT: Thank you, okay. Have you ever  
14 had contact with her, Mr. Mahoney?

15 THE DEFENDANT: I have not, your Honor, I just  
16 read her last report that had expressly to deal with  
17 632-A:2, which I'm on the web page of now and which I've  
18 been on the web page the last three years now.

19 THE COURT: Mr. Garrity, do you know her  
20 background?

21 MR. GARRITY: She's a public defender, judge

22 --

23 THE COURT: But does she have trial  
24 experience?

25 MR. GARRITY: Oh, definitely, but she's a New

1 Hampshire public defender. She did trial work and now  
2 is an appellate --

3 THE COURT: I see. There's a question about  
4 whether a New Hampshire public defender can represent  
5 someone in federal court. I don't know if that's  
6 authorized under their funding or their legislative  
7 authorization, I don't know, but -- do you know?

8 MR. GARRITY: I would think not but --

9 THE COURT: I would think not, but it is  
10 something I could ask.

11 THE DEFENDANT: I would ask, respectfully,  
12 about that, judge, I think any time you have an attorney  
13 with a bar association number, anyone can stand by as  
14 standby counsel.

15 THE COURT: Oh, time out. I'm not --  
16 constitutionally there's nothing stopping her. I'm just  
17 asking if her employers would permit her to do that  
18 because that might not be within their legislative  
19 mandate or funding, but I appreciate your suggestion. I  
20 just want to take it one step at a time.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Now here's the problem, okay, I  
23 don't want to let Mr. Garrity go yet for this reason. I  
24 still need to determine your competency.

25 THE DEFENDANT: Yes --

1 THE COURT: Slow down.

2 THE DEFENDANT: Yes.

3 THE COURT: I need to determine your  
4 competency. I ordered that partially on your request.  
5 It was a joint request by you and your lawyer many  
6 months ago.

7 THE DEFENDANT: If I may, your Honor, I  
8 believe --

9 THE COURT: You may not yet. Take turns  
10 talking here.

11 THE DEFENDANT: Sorry.

12 THE COURT: The problem is this. So I ordered  
13 a competency evaluation. Dr. Mart is here. He  
14 conducted I guess the first, he conducted part of an  
15 evaluation. He wrote a letter on September 26th which  
16 told your lawyer that he was unable to do the type of  
17 assessment he would normally do under the circumstances  
18 because at the time you were manic, it was tough to  
19 follow you. His report for the court dated October 20,  
20 2011, has the following in it. Quote -- he opined that  
21 you were not competent to stand trial. But he did say  
22 there's a possibility that you could be restored to  
23 competence with medication. He said, quote, with regard  
24 to the possibility of a restoration to competence, it  
25 should be noted that when I interviewed Mr. Mahoney, he



1 told me that he was not currently taking any  
2 psychotropic medication and that he had not been  
3 prescribed Seroquel during the current incarceration,  
4 close quote. But then your lawyer, Mr. Garrity, at that  
5 point you had a January hearing scheduled for  
6 competency, the one we're doing today. It was  
7 originally scheduled for January, and your lawyer filed  
8 document number 59 which was a motion to continue this  
9 competency hearing. And he stated that the competency  
10 hearing was actually supposed to be February 7, 2012.  
11 I'm sorry, January 3rd for competency, February 7th for  
12 trial. But your lawyer said in paragraph two of  
13 document number 59, quote, however, the accused's  
14 independent competency evaluation cannot be completed  
15 without the regulation of Mr. Mahoney's recently  
16 increased medications, unquote. I ordered in document  
17 number 60 on December 29, 2011, the following. I  
18 granted the motion to continue till today under the  
19 following grounds. Quote, the court apprehends the need  
20 for a delay to enable the increased dosage to facilitate  
21 the evaluation but does not wish to delay the  
22 proceedings any longer than necessary, unquote. Because  
23 I know you're very intent, Mr. Mahoney, on getting this  
24 proceeding resolved one way or the other, to trial. So  
25 I ordered just a short delay. The problem is, Dr. Mart

1 has not been back to see you to complete that evaluation  
2 under your current medical regimen.

3 Can you tell me what medical regimen you're  
4 under now, what are you taking?

5 THE DEFENDANT: Right, your Honor, I'm on the  
6 correct medication of Xanax, three times a day that I  
7 took for the past seven years. Seroquel twice a day. I  
8 take it for the past four years. And I'm on clonidine  
9 they put me on for high blood pressure, judge, so I'm on  
10 the same prescribed medication as I was seven years ago.

11 THE COURT: Right, that you were not getting  
12 in Strafford County.

13 THE DEFENDANT: I wasn't getting it at all  
14 because of some sort of abuse discretion there which of  
15 course I'm only one of two inmates getting this  
16 medication at Cheshire County House of Correction.

17 THE COURT: Okay, please be seated. Mr.  
18 Garrity.

19 MR. GARRITY: Lars Peterson, who is the  
20 medical person I've been dealing with over at Cheshire  
21 County Jail left me a message yesterday indicating the  
22 medications Mr. Mahoney is on. He indicated in a  
23 message that he's on 300 milligrams of Seroquel twice a  
24 day, 100 milligrams in the morning, 200 milligrams at  
25 night. Then Klonopin three times a day, one milligram.

1 And he's on clonidine for blood pressure one time a day  
2 of point 02 milligrams. And Mr. Peterson said the  
3 Klonopin is a mild sedating part of that medication.

4 THE COURT: Mr. Mahoney, does that sound  
5 accurate?

6 THE DEFENDANT: It is accurate except for the  
7 fact that Xanax is a little bit stronger. I was told by  
8 doctors, but of course he corrected it, but that's  
9 pretty accurate, judge.

10 THE COURT: So, here's what I propose.

11 THE DEFENDANT: Okay.

12 THE COURT: Dr. Mart is here today.

13 THE DEFENDANT: Okay.

14 THE COURT: And you're here today.

15 THE DEFENDANT: I saw Dr. Mart.

16 THE COURT: What I propose is, so we can have  
17 a complete record here, frankly, for your protection, of  
18 a full evaluation, I'd like to, rather than conduct this  
19 hearing right this minute, have you and him complete the  
20 evaluation. Then he can write a report and we can have  
21 this hearing on a full record because right now I've  
22 granted a motion to continue the hearing to facilitate a  
23 complete evaluation, and it has not yet been conducted.  
24 You follow me?

25 THE DEFENDANT: If I may.

1 THE COURT: You may.

2 THE DEFENDANT: Your Honor, I think the first  
3 thing that we have to remember here, I don't have the  
4 cite of the case law, your Honor, I don't know for sure,  
5 I don't have it off my head, I didn't bring any records  
6 today, it was a competency evaluation when anyone gets  
7 evaluated by a court, and of course prosecutor Huftalen  
8 did order an evaluation on competency on I believe it  
9 was April 22nd, 2011.

10 THE COURT: That was the first one.

11 THE DEFENDANT: This was the first one. I  
12 think it's very important to realize and let the court  
13 know that under the rules of criminal, the rules of  
14 criminal procedure, when you get a competency evaluation  
15 by a Bureau of Prisons, Federal Medical Center at Fort  
16 Devens, and that medical examiner, I believe a forensic  
17 psychologist who was a little bit higher than Dr. Mart,  
18 no offense, she gave a report that stated Mr. Mahoney is  
19 indeed competent to stand trial. When that happens, it  
20 occurs, you only need one qualified examiner, forensic  
21 psychiatrist to examine you, once one says you're  
22 competent you don't need to get another one unless it's  
23 requested. Mr. Garrity tried to get another one and I  
24 objected. Dr. Kissin is not here today, but her  
25 determination clearly states, long before Dr. Mart's,

1     that I was indeed competent on July 18th when you got  
2     that letter, and once you have one competency hearing,  
3     because you're not allowed to get another one, and  
4     that's the law, and it may be one of the citation case  
5     laws.

6             THE COURT: I was with you actually until you  
7     said once you had one you're not allowed to get another.  
8     I think I certainly could have relied on only one.

9             THE DEFENDANT: You can only rely on one it  
10    is.

11            THE COURT: Well, I disagree.

12            THE DEFENDANT: It's in the law book. I  
13    should have brought it with me, my fault.

14            THE COURT: I -- understood. I disagree and I  
15    did order on October 11th -- because look, things had  
16    changed by October 11th. So October 11th, document  
17    number 50, I did order a determination of mental  
18    competency based on some filings that were made with the  
19    court, some letters you had written, some of your  
20    conduct was a little concerning to the court.

21            THE DEFENDANT: It was at the time, judge, I  
22    understand that.

23            THE COURT: I remember discussing it with you,  
24    and I remember pretty --

25            THE DEFENDANT: Right.

1           THE COURT: The record will speak for itself,  
2 but my strong recollection is that you joined in this  
3 request in October for Dr. Mart to evaluate your  
4 competency.

5           THE DEFENDANT: Well, that's a mistake, it was  
6 court ordered by you.

7           THE COURT: Court ordered by me.

8           THE DEFENDANT: I expressly objected to it.  
9 As a matter of fact, we could get the tapes. The tapes  
10 were actually here. The first time and the second time  
11 I'm competent, as of Dr. Kissin's report. I do not want  
12 another competency evaluation, and I believe you  
13 yourself said no, you're going to be court ordered.  
14 There is a discrepancy in the federal law that once you  
15 are deemed competent by one qualified --

16          THE COURT: You've made the point, that's on  
17 the record.

18          THE DEFENDANT: That's the law. There is cite  
19 case law on that if Mr. Prosecutor Huftalen can relate  
20 to that, but, you know, I think what we're missing here,  
21 we're missing a truth to the whole indictment itself and  
22 what it speaks for on the failure to update. Did Mr.  
23 Mahoney travel to Massachusetts. Both prosecutor --

24          THE COURT: Listen, I understand that, but the  
25 only way we get, the people who get to decide that are a

1 jury. All right?

2 THE DEFENDANT: I understand. We have a jury  
3 for that.

4 THE COURT: The problem is, is that you've  
5 expressed a desire to represent yourself in front of the  
6 jury rather than have a lawyer.

7 THE DEFENDANT: Right.

8 THE COURT: With standby counsel. For me to  
9 let you do that, I've got to make sure you're in a  
10 mental position to do that.

11 So what I'm suggesting to you today --

12 THE DEFENDANT: Okay.

13 THE COURT: -- is since we've ordered that to  
14 take place, but there's still a portion of the  
15 competency evaluation, the independent evaluation  
16 ordered in document number 50 on October 11, 2011, since  
17 Dr. Mart is here today, I want to complete that  
18 interview today.

19 THE DEFENDANT: Oh.

20 THE COURT: That okay with you?

21 THE DEFENDANT: You know, judge, I will fully  
22 complete today and hope we can come back for another  
23 hearing this afternoon, put it off for second call  
24 because, you know, I'm still locked up --

25 THE COURT: And I am very sensitive to that.

1 I want you to know that. It is not lost on me that you  
2 are detained, and that's why I'm trying to move this  
3 thing along as quickly as I can. I wish I had an  
4 explanation for you as to why the evaluation wasn't  
5 completed despite my order, but the fact is it wasn't  
6 and we need to get it done.

7 So, now, until after that, okay, I'd like to  
8 appoint you -- I would like for you to have counsel  
9 represent you at least at the competency hearing, I'm  
10 not talking about trial, just to represent you at the  
11 competency hearing. Would you permit Mr. -- do you have  
12 any objection to Mr. Garrity doing that or would you  
13 like new counsel for this hearing?

14 THE DEFENDANT: No, no, that would be quite  
15 all right with Mr. Garrity, your Honor, since Mr.  
16 Garrity is the one who referred me to Dr. Mart.

17 THE COURT: Mr. Garrity, are you -- now you've  
18 been reported to the PCC by your client. So you're in a  
19 little bit of a strange position here. I do not intend  
20 to let you continue to represent him at trial, but he  
21 needs an advocate for the competency determination.

22 MR. GARRITY: Judge, I have no problem doing  
23 that, judge.

24 THE COURT: You'll remain?

25 MR. GARRITY: I will.



1           THE COURT: All right. Okay. A little bit of  
2 a tenuous position here in a lot of areas, but I'm going  
3 to try to keep this thing going. So here's what I'm  
4 going to order. We're here today, we're all here, we  
5 don't have to waste the doctor's time or your time. We  
6 will conduct that in the marshal's facilities. We will  
7 have that conducted. I'd like -- Dr. Mart, I'm going to  
8 ask you to write your report as quickly as you can, I  
9 don't mean by the end of today, draft the report to  
10 provide to Mr. Garrity so that he can provide it to the  
11 prosecutor, and we can reschedule a hearing as soon as  
12 possible.

13           Dr. Mart, is that okay with you?

14           DR. MART: That works okay for me, sir.

15           THE COURT: All right. Am I forgetting  
16 anything? Anything counsel wants to remind me I should  
17 have done?

18           MR. HUFTALEN: No, but there is something I'd  
19 like to add just so that the record is clear.

20           With respect to Mr. Garrity staying in for  
21 purposes of the competency hearing, the government does  
22 not object to that, and I think it's important and I  
23 know the court understands it is important that both  
24 sides of this issue be aired completely and that both  
25 sides of the issue be vigorously presented to the court.

1           Now, the government's position consistent with  
2 Dr. Kissin's report is and will be that Mr. Mahoney is  
3 competent. So it's important that someone advocate a  
4 contrary position so the court has all of the facts in  
5 front of it. Based on the history, I believe that Mr.  
6 Garrity is in a good position to do that given his prior  
7 relationship not only with the defendant but with Dr.  
8 Mart.

9           THE COURT: I appreciate you pointing that  
10 out. That is the very reason I've undertaken the course  
11 of action that I have. Dr. Mart has already opined that  
12 Mr. Mahoney is not competent, but he may change his mind  
13 after a further evaluation. And we need for defense  
14 counsel to advocate strongly on Mr. Mahoney's behalf  
15 based on whatever he puts together.

16           MR. GARRITY: Judge, one thing Mr. Mahoney  
17 wanted me to bring to the court's attention. I pointed  
18 out to him that Dr. Kissin was present by way of video.

19           THE COURT: She is.

20           MR. GARRITY: And because of that he objects  
21 to the further evaluation.

22           THE DEFENDANT: I would, today we could get it  
23 done today with both doctors here, judge, I think it  
24 would be wonderful if one could give one opinion, who  
25 has the first opinion which is more, you know, the first

1 opinion is the crucial opinion here. I didn't realize  
2 she was on video and Dr. Mart is here. I won't object  
3 to that going forward today with the competency hearing  
4 today since both doctors are here and one said I am and  
5 one said I am not.

6 THE COURT: Your objection is noted for the  
7 record.

8 THE DEFENDANT: I objected to that but I  
9 didn't notice that Dr. Kissin was here. She worked for  
10 the Bureau of Prisons. Dr. Mart is an independent. I  
11 think the Bureau of Prisons, the psychologist, forensic  
12 psychologist is much greater weight than Dr. Mart, no  
13 offense to Dr. Mart, but she is the one that evaluated  
14 me and determined that I was competent, judge, and which  
15 I am.

16 THE COURT: Understood. Here's what the court  
17 wants, though. Ultimately it's the court's decision  
18 about whether you're competent or not. It's my decision  
19 and my determination to make. And what I'd like Dr.  
20 Kissin to be in a position to do is this. To not only  
21 give her opinion based on her evaluation that she  
22 conducted of you, but to be able to review Dr. Mart's  
23 evaluation and report, because she undoubtedly will be  
24 asked questions about information and conclusions that  
25 Dr. Mart is drawing, and I need that information to make

1 my final determination.

2 So I appreciate your point. I won't overlook  
3 it. And you're trying to tell me that I should be  
4 deferring to her. She's already given her opinion. But  
5 I want the fullest most developed record that I can get.

6 THE DEFENDANT: Right, but I think when I did  
7 read Dr. Mart's evaluation it was almost parroted to Dr.  
8 Kissin's except to the point that Dr. Mart wanted to see  
9 me get on proper medication which of course I am now and  
10 I have been for the past two and a half months.

11 THE COURT: Exactly. And we don't know this,  
12 but that medication that Dr. Mart noted you were not on  
13 when he did his evaluation, is something I need him to  
14 be able to incorporate into his evaluation by talking to  
15 you today. I need to have that happen.

16 THE DEFENDANT: Okay.

17 THE COURT: So, we are in recess and we will  
18 proceed as quickly as we can. All right?

19 Counsel, please, I'm going to put you on a  
20 two-week deadline, all right, in the hope that we can be  
21 back here in two weeks. Is that realistic?

22 MR. HUFTALEN: Yes.

23 THE COURT: All right. And I'm going -- okay,  
24 so, Charli, you can work out with them exactly what  
25 date. I'd like any briefing that you file on any issues

1 before the court to be filed three days in advance of  
2 the hearing. All right?

3 MR. HUFTALEN: Will do.

4 THE COURT: All right, then, we are in recess.

5 THE DEFENDANT: Thank you, your Honor.

6 THE COURT: Thank you, Mr. Mahoney, I  
7 appreciate your cooperation today.

8 THE DEFENDANT: I'm under the correct  
9 medication, judge, thank you very much.

10 (Court adjourned at 11:45 a.m.)

11 C E R T I F I C A T E

12

13 I, Sandra L. Bailey, do hereby certify that  
14 the foregoing transcript is a true and accurate  
15 transcription of the within proceedings, to the best of  
16 my knowledge, skill, ability and belief.

17

18

19 Submitted: 8/3/12

20

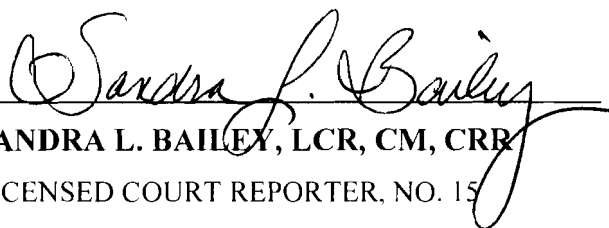
21

22

23

24

25

  
SANDRA L. BAILEY, LCR, CM, CRR  
LICENSED COURT REPORTER, NO. 15  
STATE OF NEW HAMPSHIRE